Louisiana Law Review

Volume 11 | Number 2
The Work of the Louisiana Supreme Court for the 1949-1950 Term
January 1951

Public Law: Constitutional Law

Charles A. Reynard

the ethical level of pest control operations; to serve merely as a guardian against outright fraud and as a limiting agent in the free play of competition would hardly justify its operations.

CONSTITUTIONAL LAW

*Charles A. Reynard**

The past term produced the customary share of decisions involving constitutional issues. One of them, of extraordinary significance, represents an apparent shift in the court's approach to problems of substantive due process.[1] Two less significant cases involved additional aspects of the due process clause as well as the commerce clause and freedom of speech and the press. Constitutional issues were also presented in three tax cases[2] which are discussed in the section devoted to State and Local Taxation.

In *Schwegmann Brothers v. Louisiana Board of Alcoholic Beverage Control*,[3] by far the most important constitutional law case of the term, the court set the hands of the judicial clock back twenty years when it declared that the price-fixing provisions of the Alcoholic Beverage Control Act of 1948[4] "are manifestly unreasonable within the contemplation of the state's police power, and, hence, are unconstitutional in that they violate the due process clauses of our state and federal constitutions."[5] This, to the knowledge of the writer, is the first decision of the court to invalidate legislation on the ground of substantive due process since 1930;[6] it is the only one in its history to reject price-fixing as a legitimate device for the regulation of the state's economic welfare. Three other price-fixing statutes enacted by the legis-

* Associate Professor of Law, Louisiana State University.

1. Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control, 216 La. 148, 43 So. 2d 248 (1949).

2. Interstate Oil Pipe Line Co. v. Guilbeau, 217 La. 160, 46 So. 2d 113 (1950); State ex rel. Fontenot, Collector of Revenue v. Standard Dredging Corp., 216 La. 509, 43 So. 2d 909 (1949); and DiGiovanni v. Cortinas, 216 La. 687, 44 So. 2d 818 (1950). See discussion of these cases, infra p. 214 et seq.

3. 216 La. 148, 43 So. 2d 248 (1949).

4. La. Act 360 of 1948 (La. R.S. [1950] 26:1 et seq.).

5. 216 La. 148, 182, 43 So. 2d 248, 259 (1949).

6. In City of Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930), believed to be the last decision to invalidate a regulation of economic affairs, the court had held that "the requirement in the ordinance that barber shops shall be closed at 6:30 p.m. . . . is not really an appropriate measure for the protection of the public health, as the alleged necessity for the restriction in the ordinance bears no reasonable relation to public health, is not supported by anything of substance, but rests, in our opinion, upon mere conjecture." 171 La. 595, 601-602, 131 So. 722, 724. The statement in the text does not take tax or license cases into account. Cf. State v. Lucas, 196 La. 299, 199 So. 126 (1940).

lature have been subjected to attack but sustained by the court during the past twelve years.[7]

The act in question is comprehensive, designed to regulate most, if not all, phases of the liquor traffic. In addition to its mandatory mark-up-over-cost provisions it creates a board for its administration, sets forth procedures and limitations for the application for, granting and suspension of permits, makes provision for the payment of fees, and delegates authority to parishes and municipalities to require annual permits and fees. In brief, it is, as its purpose clause declares, an enactment adopted "so that said traffic may not cause injury to the *economic*, social and moral well-being of the people of the State." (Italics supplied.)

Plaintiff, a retail liquor dealer, had sold liquor at prices below those required by the act; the board had ordered the suspension of its permit, and it instituted proceedings to enjoin the board from enforcing the order based upon the alleged unconstitutionality, inter alia, of the price-fixing provision of the act. This provision, the plaintiff urged, "is aimed at the ordinary hazards of competition incident to any business; price competition and credit risks. It bears no real and substantial relation to the public welfare, but is preferential legislation for certain favored groups in the liquor industry."[8] The court itself considered the questions raised by the case to be:

> "Is there a real and substantial relation between the mandatory minimum mark ups of the statute and the preventing of injury to the economic, social and moral well being of the people of the state? Are those means [the mark ups] reasonably necessary and appropriate for the accomplishment of the legitimate object or purpose which the statute announces [regulation and control of the traffic]?"[9]

Even if we accept the requirement that there be a "real and substantial relation" between the means adopted and the interest to be protected,[10] it would seem reasonable to expect affirmative

7. La. Act 48 of 1936 (La. R.S. [1950] 37:411 et seq.), sustained in Board of Barber Examiners v. Parker, 190 La. 214, 182 So. 485 (1938); The Fair Trade Act (La. Act 13 of 1936 [La. R.S. (1950) 51:391 et seq.]), sustained in Pepsodent Co. v. Krauss Co., Ltd., 200 La. 959, 9 So. 2d 303 (1942), and The Unfair Sales Act (La. Act 338 of 1940, as amended [La. R.S. (1950) 51:421 et seq.]), sustained in Louisiana Wholesale Distributors Association, Incorporated v. Rosenzweig, 214 La. 1, 36 So. 2d 403 (1948).

8. 216 La. 148, 177, 43 So. 2d 248, 258 (1949).

9. Ibid.

10. The Supreme Court of the United States, which has not declared a statute regulating economic affairs to be a violation of due process since 1937, imposes a less severe test. The post-1937 test adopted by the majority

answers to these questions from the same court which had found such a relationship to exist between "minimum price regulations and the sanitation and hygiene standards required of barbers . . . in the interest of public health and safety,"[11] between legislative authorization of price maintenance and the protection of "the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand, or name,"[12] and, finally, between a statutory mandate that the retail price of "any merchandise" be fixed at cost plus six per cent and the protection of the "public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair sales and discriminatory practices by which fair and honest competition is destroyed or prevented."[13] Such an expectation seemed particularly justified where, as here, the subject of regulation was the liquor traffic, a favored object of legislative control since time immemorial. One fairly obvious connection between the mandatory mark ups and "the economic . . . well-being of the people of the State" is their tendency to prevent ruthless price competition and the evils said to result therefrom—the very element so heavily relied upon to sustain the Unfair Sales Act[14] and the Fair Trade Act.[15]

In the face of these strong precedents which have represented the settled policy of the court in matters of substantive due process for at least a dozen years, it struck down the statute, saying that:

> ". . . there is no recitation in the statute revealing a legislative finding that such a condition [cut-throat competition and price wars] in the liquor traffic existed in Louisiana at the time of or within a few years prior to the enactment of the legislation. Neither does the evidence adduced at the trial of this case conclusively disclose the existence thereof; at the most it shows that several isolated price cutting inci-

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of that Court is well stated in a 1944 case where it is said, "A violation of the Fourteenth Amendment . . . would depend upon *whether there is any rational basis for the action of the legislature.*" Sage Stores Co. v. Kansas, 323 U.S. 32, 35 (1944). (Italics supplied.) Two of the present members of the Court (Justices Black and Douglas) deny the existence of judicial limitations of any character whatsoever in such cases. See Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942).

11. Board of Barber Examiners v. Parker, 190 La. 214, 182 So. 485 (1938).

12. Pepsodent Co. v. Krauss Co., Ltd., 200 La. 959, 9 So. 2d 303 (1942).

13. Louisiana Wholesale Distributors Association, Incorporated v. Rosenzweig, 214 La. 1, 36 So. 2d 403 (1948).

14. Ibid.

15. Note 12 supra.

> dents between certain individuals occurred many years before the adoption of the statute."[16]

Leaving aside the fact that the legislature in this case *had* declared a purpose to extend protection to the "economic . . . well-being of the people of the State," it is now well established that the legislative devices of fact-finding and policy-declaring clauses serve merely as interpretive aids to the courts and are wholly inconclusive on the issue of constitutionality.[17] Enactments containing the most elaborate of such clauses have been declared invalid, while others, omitting them, have been sustained. They add little, if anything, to the universally accepted principle that a presumption of validity attends all legislative enactments. A statute must stand or fall upon the constitutional power of the legislature irrespective of the avowed motive of enactment. It is the second statement in the court's opinion quoted above that causes real concern; that the evidence did not "conclusively disclose the existence" of price wars and other manifestations of cut-throat competition. If, in its reference to the evidence, the court means to imply that a person asserting the validity of a statute must assume the burden of proof, a wholly new doctrine of constitutional law has been adopted and the presumption of validity cast aside. It is, of course, doubtful that the court intended any such departure from traditional policy in this respect. Yet it is extremely difficult to determine just what was otherwise intended by the quoted sentence. It may mean that the existence of an economic issue must be conclusively established as a condition precedent to the further consideration of the constitutional issues of the case. If so, the issue of constitutionality is divided into two parts: the first involves an inquiry into the existence or alleged existence of the condition which has moved the legislature to act, and the second, an inquiry into the means adopted to cope with that condition. This interpretation of the judicial process in the instant case seems corroborated by the subsequent language of the opinion. Had the court stopped at this point, however, thus subdividing the inquiry and requiring the supporters of the legislation conclusively to show the existence of an economic issue, the following clearly stated proposi-

16. 216 La. 148, 177-178, 43 So. 2d 248, 258 (1949).

17. Chastleton Corporation v. Sinclair, 264 U.S. 543 (1924). Recall the fate of the National Industrial Recovery Act of 1933 in Schechter Corp. v. United States, 295 U.S. 495 (1935), as well as that of the Bituminous Coal Conservation Act of 1935 in Carter v. Carter Coal Co., 298 U.S. 238 (1936), both of which had extensive fact-finding and policy-declaring clauses.

tion to the contrary in the Fair Trade Act decision would have been overruled:

> "The Legislature is vested with a large discretion in determining what the public interest requires and what measures are necessary to protect that interest. *Even in cases where there is a dispute as to whether or not an economic question is involved, and the Legislature has acted in respect thereto, the courts will not disturb this exercise of a legislative function.*"[18] (Italics supplied.)

Whether influenced by these considerations or not, the court did not rest its decision on the inconclusive nature of the evidence offered to show past, present or likely future existence of price wars and cut-throat competition. It gave the act the benefit of the doubt on this point, saying:

> "But assuming for the sake of argument that liquor price wars are possible of occurrence in this state and that stringent regulations to prevent them are needed, we do not agree that the mandatory mark ups provided by Act 360 of 1948 constitute appropriate means for the achievement of that purpose."

Standing alone, of course, this excerpt from the opinion is amazing! Amazing, first because it contradicts common knowledge—a more effective method of preventing price wars than by the device of mandatory mark ups over cost has not yet been designed. Amazing, in the second place because it substitutes judicial opinion for that of the legislative body in a matter which is peculiarly within the province of the latter. Amazing, finally, because the same court on two previous occasions had sustained minimum price fixing statutes, the stated and acknowledged purposes of which were to prevent price wars, cut-throat competition and the evils that attend such practices.[19] Since the conclusion quoted above was the basis for invalidating the statute, fairness dictates a statement of the reason assigned by the court in its support. The sole reason assigned was that the mandatory mark up provisions did not extend to sales by manufacturers or distillers, to sales of beer or to sales of liquor by the drink over the bar. In other words, since the mandatory mark ups applied only to wholesalers and retail dealers of packaged liquors, they were regarded "inappropriate for the achievement of the legitimate

18. 200 La. 959, 979, 9 So. 2d 303, 309 (1942).

19. Pepsodent Co. v. Krauss Co., Ltd., 200 La. 959, 9 So. 2d 303 (1942) and Louisiana Wholesale Distributors Association, Incorporated v. Rosenzweig, 214 La. 1, 36 So. 2d 403 (1948).

object described in the statute."[20] Now it is submitted that the plaintiff's real grievance, if any, concerning this aspect of the act was a denial of equal protection, rather than due process—it as well as other retailers, along with wholesalers, were being accorded different treatment in the state's regulation of the liquor traffic. It is submitted, however, that the classification thus drawn is so eminently reasonable that it would in all likelihood withstand any such attack. On the due process issue, however, it must be conceded that the mandatory mark ups, applied to wholesale and retail dealers of packaged liquors, did regulate a very substantial portion of the liquor traffic. And if the language of the Unfair Sales Act and Fair Trade Act decisions is to be taken at face value, these mark ups had a real and substantial relation to the "economic . . . well-being of the people of the State," despite the fact that they did not apply to every aspect of the liquor traffic. The Unfair Sales Act does not apply to sales by manufacturers, and the Fair Trade Act applies solely to sales of merchandise bearing distinctive trade marks, brands or names. The same or similar considerations which moved the legislature to limit the application of these other statutes were undoubtedly present and taken into account when the act in the instant case was adopted.[21] It may be true that the failure to extend the mark up provision to manufacturers and others made the act less desirable. But due process does not compel the legislature to furnish us with enactments that will receive universal acclaim as being the best, wisest or most just. It simply demands that no law be adopted which is manifestly arbitrary, whimsical or capricious. Certainly these terms may not be applied to the act in question and, significantly, the court refrained from doing so.

The opinion leaves the reader with the uncomfortable feeling that it portends a return of the era when judges ruthlessly imposed their own notions over those of legislatures in determining the need for and desirability of the regulation of the economic affairs of the people. Viewed purely as a practical rather than a legal matter, the writer agrees with the court's opinion. There seems to be little doubt that the price-fixing provisions of the act were undesirable, and were, in all probability, the result of lobbying activity on behalf of the small group that would derive substantial benefits therefrom to the probable detriment of the

20. 216 La. 148, 182, 43 So. 2d 248, 259 (1949).

21. The testimony of one witness who was a proponent of the legislation attests the practical impossibility of applying the mark-ups to drinks across the bar. 216 La. 148, 181-182, 43 So. 2d 248, 259 (1949).

consuming public.[22] But these considerations are at least debatable and merely question the wisdom of the legislation. We should not forget the admonition of the late Mr. Justice Murphy: "The forum for the correction of ill-considered legislation is a responsive legislature."[23]

City of Alexandria v. Jones[24] and *City of Alexandria v. Breard*[25] each involved appeals by house-to-house salesmen who had been convicted under the provisions of the city's so-called "Green River" ordinance[26] which declares such activity to be a nuisance and forbids it unless the vendor has been requested or invited to do so by the householder. In both cases the defendants had admittedly engaged in conduct which was proscribed by the ordinance; in both cases the validity of the enactment was assailed on constitutional grounds; and in both cases the ordinance was sustained.

In the *Jones* case the sole ground of attack was that the ordinance offended the due process clauses of the State and Federal Constitutions. Breard, engaged in soliciting subscriptions for magazines to be filled from out of state sources, also advanced the due process defense, but in addition urged that the ordinance, when applied to him, placed an undue and discriminatory burden upon interstate commerce and abridged freedom of speech or of the press contrary to state[27] and federal[28] constitutional guaranties.

The due process argument is, of course, the most easily surmountable obstacle of the cases and requires the court to do no more than to acquiesce in the legislative judgment that public safety and convenience demands that solicitors refrain from

22. This conjecture seems amply supported by the fact that "Joining the defendant in urging the constitutionality of the statute were the Louisiana Wholesale Liquor Dealers Association and the Louisiana Retail Liquor Dealers Association, as well as numerous individual wholesale and retail liquor dealers, . . . Also intervening, but supporting the position of plaintiff, were seven New Orleans citizens who alleged themselves to be representative of the great body of consumers in this state. . . ." 216 La. 148, 155, 156, 43 So. 2d 248, 250 (1949).

23. Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949).

24. 216 La. 923, 45 So. 2d 79 (1950).

25. 47 So. 2d 553 (La. 1950).

26. The ordinance takes its name from the town of Green River, Wyoming, which was apparently the first to adopt a measure in the form here involved, and which has since been adopted by hundreds of other municipalities throughout the nation. The original ordinance was sustained against attack on constitutional grounds in Fuller Brush Co. v. Town of Green River, 60 F. 2d 613 (C.A. 10th 1932), affirmed in 65 F. 2d 112 (C.A. 10th 1933).

27. La. Const. of 1921, Art. I, § 3.

28. U.S. Const. Amend. I, as made applicable to the states through Amend. XIV, § 1.

making uninvited visits to private residences. The court itself viewed the ordinance as "a protective measure, conceived and designed to give the occupants of the home . . . and their property additional security against the depredations of the lawless, who often under the guise of soliciting or peddling gain entrance for the purpose of (a) planning a future crime or (b) perpetrating a crime immediately,"[29] although, as in *Schwegmann*,[30] the legislation contained no recital that the suppression of these vices was an objective of the enactment, and some persons have charged that this type of ordinance is simply preferential legislation favoring local merchants. Nor did the court embark upon an inquiry into the necessity for or appropriateness of the means adopted to accomplish this legislative purpose, despite the fact that Section 3 exempts "soliciting of orders for the sale of milk, dairy products, vegetables, poultry, eggs and other farm and garden products," thus eliminating a substantial segment of the peddling public from the regulation so imposed. For the reasons advanced at some length in the discussion of the *Schwegmann*[31] opinion, the writer regards the due process issue in these two cases to be correctly decided.

The defense of the commerce clause, raised by the *Breard* case, presents a more disputed issue, but upon the basis of the jurisprudence of the Supreme Court of the United States, "the final arbiter"[32] of that question, it appears to have been properly rejected. It should first be noted that the ordinance is nondiscriminatory; it applies to all uninvited solicitation whether it involves interstate or intrastate implications. Since there are numerous solicitors of both classes, the principle of discrimination invoked in *Best & Company v. Maxwell*[33] is not applicable. Similarly, the principle of the "drummer cases"[34] seems inappropriate as those cases involved efforts of states and municipalities

29. 47 So. 2d 553, 555 (La. 1950).

30. Schwegmann Bros. v. Louisiana Board of Alcoholic Beverage Control, 216 La. 148, 43 So. 2d 248 (1949).

31. Ibid.

32. Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945).

33. 311 U.S. 454 (1940).

34. Nippert v. City of Richmond, 327 U.S. 416 (1946); Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925); Rodgers v. Arkansas, 227 U.S. 401 (1913); Crenshaw v. Arkansas, 227 U.S. 389 (1913); Davis v. Virginia, 236 U.S. 697 (1915); Stewart v. Michigan, 232 U.S. 665 (1914); Dozier v. Alabama, 218 U.S. 124 (1910); Rearick v. Pennsylvania, 203 U.S. 507 (1906); Caldwell v. North Carolina, 187 U.S. 622 (1903); Stockard v. Morgan, 185 U.S. 27 (1902); Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Asher v. Texas, 128 U.S. 129 (1888); Brennan v. Titusville, 153 U.S. 289 (1894); Corson v. Maryland, 120 U.S. 502 (1887), and Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

to tax, license or bond the itinerant vendor, thereby exacting monetary contributions which, in practical operation, placed such a heavy burden on the conduct of commerce as to burden seriously if not to eradicate it. ". . . attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of commerce."[35] This is not to say, of course, that the negative implications of the commerce clause have no application to the police powers of the state. "Reconciliation of the conflicting claims of state and national power," stated former Chief Justice Stone, is to be achieved by "appraisal and accommodation of the competing demands of the state and national interests involved."[36] And in the course of such reconciliation, the court, speaking through Justice Stone, concluded that the states might regulate the width of trucks moving over their highways in interstate commerce, but could not regulate the length of interstate trains. The interests of public safety and convenience in the former situation outweighed the national interest, but not in the latter. It is submitted that Alexandria's interest in abating the nuisance which prompted the enactment of the ordinance in question outweighs the national interest involved, and that the appeal which has been taken to the United States Supreme Court[37] on that point should be affirmed.

On the final point of defense, that predicated upon the guaranties of free speech or press, considerable doubt might have attended the decision had it not been for the recent decision of the Supreme Court of the United States in *American Communications Association v. Douds*.[38] It had never been contended that these freedoms were absolute, but at least until the *Douds* case it was thought that restrictions might be imposed only in the face of clear and present danger, and that one whose rights were so abridged might show that no emergency existed which justified the restriction. In that decision, however, the court accepted congressional judgment regarding the existence of an emergency, and also held that the danger to be protected against need not be a danger to the nation. Thus Congress was permitted to abridge free speech to the extent of requiring an oath, both as to personal conduct and beliefs, as well as to the beliefs of an organization as a means of regulating interstate commerce. If this approach is

35. Freeman v. Hewit, 329 U.S. 249, 253 (1946).
36. Southern Pacific Co. v. Arizona, 325 U.S. 761, 768-769 (1945).
37. Appeal filed on November 2, 1950, probable jurisdiction noted, December 11, 1950, Docket Number 399.
38. 339 U.S. 382 (1950).

to be followed, a city council seems justified in similarly abridging speech and press in the exercise of its police power directed toward the protection of its citizens and their property which it has properly found to be endangered.

LOCAL GOVERNMENT LAW

*Jerome J. Shestack**

Over two hundred years ago Thomas Madox wrote that the subject matter of corporated towns and communities is extensive and difficult.[1] The years have not denied this observation. On the contrary, time has brought added complexity. The available rules have simply not met the needs of an ever-enlarging field.[2] In the last term of the supreme court the local government cases proved no exception. Although generally reaching what appear to be sound results, the language of the opinions often presents perplexities that should elicit no enthusiasm from those concerned with municipal law.

ELECTION OF ORDINANCES

The question of what form a proposition must take when submitted to the electors of a municipality was raised in two cases.

In *Holt v. Vernon Parish School Board*[3] a proposition was submitted to the voters of a school district ward to incur debt and issue obligations "for the purpose of constructing and equipping a gymnasium-auditorium, lunch room, and repairing present school buildings" in the district. In *State ex rel. Bussie v. Fant*,[4] relators attempted to force the city council to submit to the electors of the city an ordinance raising the salaries of fire department employees ten cents an hour and police department employees fifteen cents an hour.

In each case it was contended that the proposition in question was illegal in that it contained more than one proposition without affording the electors an opportunity to vote on each one

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* Assistant Professor of Law, Louisiana State University.

1. Thomas Madox, Historical Essay Concerning the Cities, Towns and Buroughs of England, taken from Records (1726) quoted in Dillon, Municipal Corporations, preface (5 ed. 1911) and in Harris, Municipal Corporations, 5 Rutgers L. Rev. 76 (1950).

2. A malady not localized of course to local government law.

3. 217 La. 1, 45 So. 2d 745 (1950).

4. 216 La. 58, 43 So. 2d 217 (1949).